Thus in the conclusion to its brief, the Republic of Liberia openly states that the NLRB lacks jurisdiction, and "there is therefore no impediment to a state court injunction." In short, by means of the state courts, Incres and the *amicus* countries intend to foreclose American maritime unions from any effort to alleviate the economic depredations of Panlibhon shipping. At least one state court has already decided that this Court's finding of lack of Board jurisdiction in the *Benz* case automatically condemns picketing of foreign flag vessels and justifies a state court injunction. *Fruit Dispatch Co.* v. *National Maritime Union*, 50 LRRM 2077 (La. Ct. of App., 1962).

Moreover, the claim that the New York state courts have jurisdiction of this controversy exposes a fatal inconsistency in the position of Incres and the *amicus* countries. On the one hand, they contend that the Board—a government agency—has no jurisdiction of the controversy. On the other hand, they contend that state courts—also agencies of government—have jurisdiction of the controversy. At the same time, the Republic of Liberia in the conclusion to its brief states that it has "sole jurisdiction over the subject matter." If the Republic of Liberia has sole jurisdiction, from whence arises the jurisdiction of state courts? And how justify that the state courts have jurisdiction and the NLRB does not? The very necessity for resort to the state courts emphasizes the intimate connection of Incres' operations with the economy of this nation. As the OEEC, *Study On The Expansion of The Flags of Convenience Fleets* (1958), pointed out (at p. 11):

> "The extent to which shipowners, charterers, etc. have recourse to the courts of the flag state of the defendant probably reflects to a greater degree than most aspects of shipping the true relationships between the ship and her flag. Where a shipping

company has no assets in the flag state, and the owners, directors and managers are not nationals, it is useless to have recourse to the courts in those countries as they cannot enforce their decisions. It is significant that even the owners of vessels under flags of convenience prefer to have their disputes settled in the courts of the maritime countries."

Yet a farther incongruity will result if Board jurisdiction is denied. On the one hand, we will have this Court saying in *Marine Cooks* that protest picketing of foreign flag ships by American maritime unions is protected against injunctions by the Norris-LaGuardia Act, and, on the other hand, that the processes of the Board are unavailable to help resolve the disputes peacefully.

This incongruity will in turn breed inequities. For while the maritime unions will be denied access to the Board for the purpose of being certified as bargaining representatives, nothing will prevent ship operators or others on their behalf from using the facilities of the Board to file charges against the maritime unions for secondary boycott activities or other violations of the Act, since any "person" may lodge a complaint against a union unfair practice. This is not mere speculation. In *Compania Maritima Samsac, Ltd.* CCH Lab. L. Rep., Par. 10081 (4th Ed. 1950), a maritime employer succeeded in persuading the Board that it did not have jurisdiction over an election petition filed by the union against his Liberian flag ship. However, when the union picketed, he procured a drydock owner to file charges against the picketing. *Moore Drydock Co.*, 92 NLRB 547 (1950). This incongruous result was pointed up by Mr. Justice Douglas in his dissent in the *Benz* case, 353 U. S. at 148.

Conclusion.

The judgment of the New York Court of Appeals should be affirmed.

Dated: August 22, 1962.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 33

INCRES STEAMSHIP COMPANY, LTD., PETITIONER

v.

INTERNATIONAL MARITIME WORKERS UNION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

No. 91

IVAN C. MCCLEOD, REGIONAL DIRECTOR FOR THE SECOND REGION OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

EMPRESA HONDURENA DE VAPORES, S.A.

No. 93

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, PETITIONER

v.

EMPRESA HONDURENA DE VAPORES, S.A.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 107

FRANK W. MCCULLOCH, CHAIRMAN, AND PHILLIP RAY RODGERS, BOYD LEEDOM, JOHN H. FANNING, AND GERALD A. BROWN, MEMBERS, NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

In the *Incres* case, the oral opinion of the Special Term of the Supreme Court, New York County (R.

No. 33, pp. 250–256) has not been officially reported. The majority and dissenting opinions of the Appellate Division (R. 265–282) are reported at 11 A.D. 2d 177, 202 N.Y. Supp. 2d 692. The majority and dissenting opinions of the Court of Appeals of the State of New York (R. 285–295) are reported at 10 N.Y. 2d 218, 176 N.E. 2d 719.

In the *Empresa* case, in Nos. 91 and 93 the opinion of the District Court for the Southern District of New York (R. 46–52) is reported at 200 F. Supp. 484; and the opinion of the Court of Appeals for the Second Circuit (R. 59–82) is reported at 300 F. 2d 222. In No. 107, the opinion of the District Court for the District of Columbia (R. 51–67) is reported at 201 F. Supp. 82.

JURISDICTION

The judgment of the Court of Appeals of the State of New York in No. 33 was entered on July 7, 1961 (R. 296–297), and the petition for a writ of certiorari was granted on December 4, 1961 (R. 300; 368 U.S. 924).

The judgment of the Court of Appeals in Nos. 91 and 93 was entered on January 12, 1962 (R. 83), and the petitions for writs of certiorari were granted on June 11, 1962 (R. 88; 370 U.S. 915). The judgment of the District Court in No. 107 was entered on March 6, 1962 (R. 76–77), and the petition for a writ of certiorari, in advance of judgment by the court of appeals, was granted on June 11, 1962 (R. 82; 370 U.S. 915).

QUESTION PRESENTED

The United States will discuss the following question in this brief:

Whether the National Labor Relations Act applies to labor controversies on foreign flag ships engaged in the commerce of the United States—

(1) which are substantially engaged in the foreign commerce of, and have other bona fide substantial connections with, the flag nation, or

(2) which, although not engaged in the commerce of the flag nation, are beneficially owned, controlled and manned by foreign nationals and do not have any significant contacts with the United States other than the fact that they operate out of United States ports.

The United States will not discuss, and expresses no opinion on, the other questions raised by the parties.

INTEREST OF THE UNITED STATES

The *Empresa* cases (Nos. 91, 93 and 107) involve the general question, to what extent may the National Labor Relations Act be applied to vessels (1) in which United States citizens or business concerns have substantial control and/or beneficial interests, (2) which fly the flag of and are registered by a foreign nation and (3) which are engaged in the foreign commerce of the United States. Although the vessels in this large and loose category have widely different degrees of connection with the United States and foreign nations, there is one fundamental distinction which divides the general category into two classes.

(1) Some of these "U.S. owned" vessels are being used to a substantial extent to meet the shipping needs of the nation whose flag they fly; the vessels involved in the *Empresa* cases are good examples. Such vessels may also have other significant links with the flag nation. Thus, a vessel may be regularly fitted out and repaired in a port of the flag nation. Its nationals may compose a majority of her crew.

(2) Other "U.S. owned" vessels fly what is truly a "flag of convenience"—the colors of a nation with which they have little substantial connection.[1] Good examples are tankers flying the Panamanian flag which ply between the United States and Venezuela or the Middle East, and ore ships which fly the Liberian flag in commerce between the United States and Guiana. Most of these ships are registered under the laws of Panama and Liberia and fly the flags of those nations.

The *Empresa* cases (Nos 91, 93 and 107) fall into the first class. As described more fully in the Statement, *infra*, pp. 16–17, most of the vessels are owned and all are operated by Empresa, a Honduran subsidiary of the United Fruit Company. They are cargo vessels registered in Honduras; they fly the Honduran flag and have crews composed preponderantly of Hondurans employed in Honduras under shipping articles executed there. The crews are represented by an Honduran union, which has executed

[1] The term "flag of convenience" will be used in this brief to refer just to those vessels having no substantial connection with the country whose flag they fly.

an extensive collective bargaining agreement with Empresa. The ships operate between the United States and Central and South America, carrying cargoes of the United Fruit Company. They call regularly at United States ports and also at Honduran ports; they bring Honduran produce to the United States and carry American goods for use and sale in Honduras, although they also touch at other South and Central American ports. While the vessels are operated as part of the fleet of the United Fruit Company, to which they are chartered, their day-to-day operations are handled by Empresa, which provisions the ships, hires the officers and crews, disciplines personnel, and handles all matters concerning terms and conditions of employment. Empresa has no common officers or directors with United Fruit; and the corporation maintains its own records, owns land, and functions as a distinct corporate entity.

The *Incres* case (No. 33) involves a true "flag of convenience" because its two vessels are not carrying the commerce of Liberia and have no other significant connections with Liberia, whose flag they fly. See the Statement, *infra*, pp. 21–23. In our opinion, however, the American interests are not sufficient to bring the vessels within the general category with which we are concerned, *i.e.*, American owned and controlled ships, engaged in the commerce of the United States, but flying a foreign flag. The Incres vessels are owned and operated by a Liberian corporation, whose stockholders are Italian citizens and residents. The members of the crews are all foreign, principally Ital-

ian, and were signed on in Italy under Liberian articles. The vessels return to Italy every year, where they are repaired and refitted and the crews receive a vacation. The day-to-day management of the vessels is conducted partly by the president of the Liberian corporation, an Italian national; partly by a New York steamship agency which is a wholly owned subsidiary of the Liberian corporation; and partly by an agency in Nassau. Thus, while the two vessels are engaged for seven months of the year on regularly scheduled cruises between New York and Caribbean ports, no American control or ownership is involved.

In recent years American maritime unions have been seeking to organize foreign flag vessels which they feel have sufficient American contacts. In the course of the organizing campaigns the unions have invoked the jurisdiction of the National Labor Relations Board. The Board has regularly asserted jurisdiction regardless of whether the vessels fall in one class or the other.[2] The employers' challenges to

[2] In addition to the *United Fruit* case, the Board has taken jurisdiction in five other cases involving foreign flag ships. *West India Fruit and Steamship Co., Inc.*, 130 N.L.R.B. 343, an unfair labor practice case, pending on the company's petition to review, in the Fifth Circuit; *Peninsular and Occidental S.S. Co.*, 132 N.L.R.B. 10, also an unfair labor practice case, pending on the Board's petition for enforcement, in the Fifth Circuit; *Eastern Shipping Corp.*, 132 N.L.R.B. 930, *Hamilton Bro., Inc.*, 133 N.L.R.B. 868, and *Owens-Illinois Glass Company*, 136 N.L.R.B. No. 32, all representation cases. See also, *Navios Corp.* v. *National Maritime Union*, 402 Pa. 325, 166 A. 2d 625, certiorari denied, 366 U.S. 905. The Board has declined jurisdiction in *Dalzell Towing Company*, 137 N.L.R.B. No. 48.

the Board's jurisdiction bring the question of NLRB jurisdiction to the courts.

The United States has a profound interest in the resolution of these jurisdictional questions. It is concerned with the correct construction of a federal statute, although the primary responsibility for that question would, of course, normally rest with the National Labor Relations Board. The extraordinary feature of these cases which requires the participation of the United States, in order to express the considered position of the Executive Branch, is their potential impact upon foreign policy, national defense and maritime labor relations.

Foreign Policy. In the opinion of the responsible government officials, the assertion of NLRB jurisdiction over foreign flag vessels would embarrass the United States in the conduct of its international relations. Several foreign governments have already protested to the State Department the Board's assumption of jurisdiction. A number have filed briefs *amicus curiae* in this Court, in which they urge that application of the National Labor Relations Act to such ships would violate international law, would conflict with treaty provisions, and would have unsettling effects upon international relations. (See *infra*, pp. 47–49, where these protests and views are set forth in detail.) While the United States does not necessarily accept all of the contentions of these foreign nations and others interested, it is plain that widespread application of the National Labor Relations Act to foreign flag vessels would have significant

repercussions upon our foreign relations, and could lead to reprisals against American shipping by the flag countries involved.

The distinction between vessels which are substantially engaged in carrying the trade of the nations whose flags they fly and vessels which are not, has significance in terms of foreign policy. The claim of the flag nation to assert exclusive jurisdiction over the labor-management relationship is much stronger in the first class, and the basis for United States regulation is correspondingly weaker. Many maritime nations are not affected by the true "flag of convenience" problems raised by some Panamanian, Liberian and Honduran vessels. Furthermore, the Geneva Convention on the High Seas, although not yet effective, provides that a ship shall have the nationality of the State whose flag she is entitled to fly, and that there must be a "genuine link" between the State and the ship. See *infra*, pp. 45–46. In pointing to this possible distinction, however, we should not be understood to minimize the present and future diplomatic problems raised by any assertion of NLRB jurisdiction over any foreign flag vessel.

National Defense. The United States is also deeply concerned with the jurisdictional question because of its effect upon the national defense. Since the end of World War II the United States flag fleet has diminished from 2,500 active merchant vessels to 885. Merchant Marine Data Sheet, October 1, 1962, Press Release MANR 62–58. According to the records of the Department of Defense, as of September 30, 1962, there were 411 ships registered in Panama, Liberia or Hon-

duras which were under substantial American beneficial ownership and management. Although it would be inappropriate here even to outline defense plans and capacity, it should be clearly understood that the officials charged with responsibility for the national defense at the highest levels hold these vessels to be essential to national security if any of a number of forms of national emergency should develop.

"Under present ownership and registry the vessels are reasonably expected to be available in an emergency, and as such are included in emergency defense planning. Because of the greater individual size and more modern construction of these ships as compared with those under U.S. flag, they represent about 50 percent of our total active emergency shipping capability. Panama, Liberia and Honduras have implicitly and historically accepted this arrangement. One hundred and eighty-six of the vessels were sold with the approval of the Maritime Administration upon the bond-supported condition that they would be made available to the United States in an emergency upon its request and that they would not be resold or transferred to foreign owners or another registry without the consent of the Maritime Commission. See Note, *The Flag-of-Convenience Fleet*, 69 Yale L. Jour. 498, 501. The other 225 ships were constructed abroad: they are the newest, biggest and most useful vessels in the event of an emergency. Although the owners have in almost all cases given written commitments to make them available to the United States and Panama, Liberia and Honduras have indicated their willingness to have such trans-

fers made, the owners are under no obligation not to sell the vessels or transfer their registry, prior to a call for emergency use by the United States, if self-interest so requires.

There is a grave, although not precisely measurable, likelihood that the successful assertion of NLRB jurisdiction over foreign flag vessels would set in train a movement to sell them to foreign owners or transfer them to other foreign registries where they would not be available to the United States in case of emergency. The wage costs of foreign vessels are only one-quarter to one-third the costs of American vessels,[3] and the assertion of NLRB jurisdiction would be regarded as a step toward the establishment of the American scale. Although the owners so assert, no one else can say with assurance whether the vessels will in fact be sold or transferred upon the sustaining of NLRB jurisdiction, or that sustaining NLRB jurisdiction will result in organization by American unions and then in the establishment of American wage scales. But although the outcome is uncertain, it is clear beyond reasonable dispute that under present economic conditions the assertion of jurisdiction will tend to stimulate the transfer of the vessels to the maritime nations of Western Europe or result in their sale for scrap. And it is utterly baseless for counsel for AFL–CIO to assert

[3] See Hearings on Vessel Transfer, Trade-In, and Reserve Fleet Policies, Before the Subcommittee on the Merchant Marine of the House Committee on Merchant Marine and Fisheries, 85th Cong., 1st Sess., Part 1, p. 142; Note, *The Flag-of-Convenience Fleet*, 69 Yale L. Jour. 498, 500.

(see Brief for the AFL–CIO as *amicus curiae* in No. 93, pp. 16–24) that such transfers would not diminish the degree of effective U.S. control. Unlike Panama, Honduras and Liberia, other nations to whose registry the vessels might be transferred would not permit the United States control of the vessels in the event of all emergencies; and there are a number of contingencies, primarily involving non-NATO emergencies, in which it would not be adequate to have the vessels part of a NATO pool.

In sum, it is the considered judgment of the Secretary of Defense that the sustaining of NLRB jurisdiction over any foreign flag vessels would raise grave problems affecting national defense.

The distinction which we have drawn between the two classes of foreign flag vessels has no relevance to the national defense. On the contrary, the true "flag of convenience fleet" is, solely by coincidence, a good deal more important than the vessels which are serving the trade of the flag nation.

Maritime Labor Relations. The decline in the United States merchant marine has resulted in a serious loss of job opportunities on board merchant vessels—from 160,000 at the end of the war to less than 50,000 today. See Note, *The Flag-of-Convenience Fleet*, 69 Yale L. Jour. 498, 502; Merchant Marine Data Sheet, October 1, 1962, Press Release MANR 62–58. While many of these seamen are believed to have found employment in other industries, there is still a substantial number of unemployed maritime workers. The same condition is at the bottom of the declines in both ships and employment: maritime wage levels

are substantially lower in the rest of the world than in the United States and competition is in an international market. Congress has itself recognized this fact in the operating subsidy program under the Merchant Marine Act, 1936, 46 U.S.C. 1101, *et seq.*

The decline of job opportunities for American seamen is of serious concern to the United States for two reasons. First, it has resulted in substantial unemployment, with resulting waste of human resources and the injury to the economy. Second, it has led to considerable instability in maritime labor relations. The American maritime unions have undertaken a drive to organize the crews of foreign flag vessels operating under the beneficial ownership and control of domestic concerns. The unions apparently believe that if such ships can be organized and their wage scales brought up to the prevailing American standard, there will be more jobs for American seamen—either as vacancies occur on the flag-of-convenience ships or because the elimination of the wage differential will lead to the return of many of those ships to American registry (R. No. 33, pp. 216–218).

It is impossible to predict with accuracy how the assertion of NLRB jurisdiction would affect the stability of maritime labor relations. The unions' organizing campaign might or might not be successful; the pressure for American wage scales and the employers' resistance to such a drastic increase in costs of operation might conceivably produce even more unrest than the present situation. It is clear, however, that sustaining NLRB jurisdiction would bring

labor relations upon "flag of convenience" vessels within an established framework familiar to American employers and labor unions and administered by national authorities, whereas a denial of NLRB jurisdiction would take the problems outside of any established procedure and would leave them without a forum except as the State courts may be brought into a labor dispute, as in the *Incres* case, when a vessel is struck or picketed in a United States port.

The foregoing interests of the United States give the Executive Branch a vital concern for the Court's ruling upon the legal issues presented. Some of them, like the foreign repercussions, are factors with which Congress can be taken to have been concerned, and are therefore strictly relevant to the interpretation of the National Labor Relations Act. Others, like the importance of the "flag-of-convenience" fleet to the national defense, may not have been foreseen by Congress in enacting the National Labor Relations Act, but they explain a major interest of the United States in the ruling upon the legal issues.

The thorny nature of the problem as well as its grave implications make this a peculiarly suitable occasion for limiting the Court's decision to the exact question before it, without expressing any opinion upon the distinguishable issues that need not be decided until they require decision. With this traditional admonition in mind the United States submits—

1. Even if the flag and registry are not always decisive, the NLRB has no statutory jurisdiction

over unfair labor practices or questions of representation involving the crew of a vessel registered in or flying the flag of a foreign nation when the vessel is being used to meet the shipping needs of the country whose flag she flies and also has other *bona fide* connections with that country.

2. Even if the flag and registry of a vessel are not always decisive, the NLRB has no statutory jurisdiction over a vessel flying a flag of convenience where the beneficial ownership and crew are foreign and the vessel has other substantial contacts with the country of which her beneficial owners are nationals.

3. The Court should decide these cases without determining whether the NLRB may ever assert jurisdiction over a foreign flag vessel or, more particularly, whether the Act covers a vessel whose beneficial ownership and management are primarily vested in nationals of the United States and which plies regularly between a port of the United States and foreign ports without being used substantially to meet the shipping needs of the nation whose flag she flies.

The failure of the United States to take a position upon NLRB jurisdiction over "U.S. owned" flag-of-convenience vessels, or to urge grounds of decision broad enough to cover that question, neither retracts nor reaffirms the position it expressed in litigation before the National Labor Relations Board.

STATEMENT

A. *The Empresa Case—Nos. 91, 93 and 107.*

1. A petition was filed with the National Labor Relations Board ("NLRB") on November 13, 1959, by

the National Maritime Union of America, AFL-CIO, pursuant to Section 9(c) of the National Labor Relations Act, 29 U.S.C. 159(c), seeking certification as the representative of all unlicensed seamen employed aboard certain Honduran flag vessels operated by Empresa Hondurena de Vapores, S.A. ("Empresa"), an Honduran corporation (R. Nos. 91 and 93, pp. 9–10). The petition was filed against United Fruit Company, an American corporation which owns all of Empresa's stock (R. Nos. 91 and 93, p. 10).[1] Sociedad Nacional de Marineros de Honduras, a Honduran union which currently represents the employees aboard the vessels, was invited but declined to intervene in the proceedings (R. Nos. 91 and 93, p. 17). However, Sindicato Maritimo Nacional de Honduras ("Sindicato") another Honduran union, did intervene and participate (R. Nos. 91 and 93, p. 17). United Fruit Company, together with Empresa (which intervened in the proceedings), contested the NLRB's jurisdiction on the ground that the Act does not apply to the foreign flag vessels operated by Empresa (R. Nos. 91 and 93, p. 10).

2. This was one of several cases in which the NLRB considered the question of its jurisdiction over vessels flying the flags of other nations but operating to a greater or lesser degree in the foreign commerce of the United States. On February 16, 1961, the Board

[1] Of the thirteen vessels involved, ten are owned and operated by Empresa, and three are owned by Balboa Shipping Corporation but operated by Empresa as agent for Balboa. Balboa is a Panamanian corporation which, like Empresa, is a subsidiary of the United Fruit Company (R. Nos. 91 and 93, p. 60).

issued its decision in *West India Fruit and Steamship Company, Inc.*, 130 N.L.R.B. 343, the leading case. The Board held that, where a foreign flag vessel is engaged in the foreign commerce of the United States, and has substantial contacts with the United States, its operation comes within the coverage of the National Labor Relations Act; and that the NLRB has jurisdiction to remedy unfair labor practices committed on such a vessel.

3. On November 15, 1961, the NLRB denied the motion to dismiss the instant case for lack of jurisdiction and issued its Decision and Direction of Election (R. Nos. 91 and 93, pp. 9–19). The Board found that most of the vessels involved were owned and all were operated by Empresa, an Honduran corporation; that they were registered under the laws, and flew the flag, of Honduras; and that the crews were composed almost wholly of Honduran citizens, hired in that country under Honduran shipping articles. The Board further found that Empresa was wholly owned by United Fruit Company, an American corporation; that United Fruit elects Empresa's directors; that Empresa, with few exceptions, time charters all of its vessels to United Fruit, which in turn determines their voyages; that Empresa carries out the typical responsibilities of the owner of a vessel under a time charter, including responsibility for the physical conditions of the ships, provisioning them, hiring the officers and crew, and handling all matters with respect to employment, including payment of wages and discipline of the personnel; and that Em-

presa provides ships that are fully equipped and ready to put to sea. (R. Nos. 91 and 93, pp. 13–14.)

With respect to the relationship between United Fruit and its subsidiaries, the Board found that while long range planning is controlled by the parent company, the day-to-day operations are handled by the subsidiaries themselves. As to Empresa, it found that there were no interlocking directors with, or officers common to, Empresa and United Fruit, and that Empresa maintains all its own records, holds real estate in its own name, and functions as a distinct corporate entity (*id.*, p. 13).

Finally, the Board found that the vessels involved operate between Central and South American countries and the United States, carrying United Fruit cargo; that they call at Honduran ports and ports of this nation; and that Empresa vessels were used interchangeably by United Fruit with other vessels which it owned or controlled, the vessels being assigned on the basis of availability, size and speed (*id.*, p. 15).

The Board concluded that "Empresa's maritime operations are a part of a single integrated maritime operation under the continuous, direct control and either direct or ultimate ownership of UFCO and are an essential part of a seagoing enterprise located in and directed from the United States and engaged in the commerce of this nation * * *." The Board also held that "Empresa through its immediate authority and control over hiring and other terms and conditions of employment and UFCO through its control

of Empresa and of the vessels and their operations are joint employers of the employees covered by the petition." The Board ruled that the maritime operations involved "possess those substantial United States contacts which, under our decision in West India, bring them within the jurisdictional coverage of the Act, despite the foreign registry of the vessels, Empresa's foreign incorporation, and the other foreign aspects present"; and that "Empresa and UFCO and their maritime operations subject of the petition are in, and affect, commerce within the meaning of Sections 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction in this proceeding" (R. Nos. 91 and 93, pp. 15–17).

The Board ordered that an election be conducted among the employees of the Empresa vessels to determine whether they wished to be represented by the National Maritime Union, by Sindicato, or by no union (R. Nos. 91 and 93, pp. 18–19). Pursuant to the Board's direction, the Regional Director of the Second Region ordered that the election commence on December 17, 1961 (R. Nos. 91 and 93, p. 2).[5]

4. On December 12, 1961, Empresa, contending that the NLRB had no jurisdiction to direct the election, filed a suit in the District Court for the Southern District of New York to enjoin the Regional Director of the Board from conducting the election (R. Nos. 91

[5] On those vessels arriving in ports of the United States between that date and January 31, 1962, the election was to be conducted in port.[6] On vessels not scheduled to arrive during that period, the election was to be conducted by mail (R. Nos. 91 and 93, p. 2).

and 93, pp. 1–7). On December 16, 1961, the district court denied a temporary injunction on the ground that the mere holding of the election, pending final determination of the legal issues, would not result in irreparable damage to Empresa (R. Nos. 91 and 93, pp. 46–52).

The Court of Appeals for the Second Circuit unanimously reversed, ruling that a temporary injunction should issue (R. Nos. 91 and 93, p. 83). The court held that the district court had jurisdiction to entertain the action; and that, in light of the facts of the case, the Board had no jurisdiction under the National Labor Relations Act to direct the election (R. Nos. 91 and 93, pp. 59–82). In an opinion by Judge Friendly, the court stated that to apply the Labor Act "would involve the risk of continuous conflict between the United States and Honduras with respect to labor conditions which, * * * are still Honduras' 'primary concern'" (R. Nos. 91 and 93, p. 77). The court stated (R. Nos. 91 and 93, p. 77):

> The case made by plaintiff's complaint goes far beyond the flying of the Honduran flag, important as Lauritzen teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters. Though the vessels are engaged in the foreign commerce of the United States, they

are also engaged in the foreign commerce of Honduras. The only United States contacts not matched by Honduran ones are United Fruit's stock ownership and its direction and use of the voyages; these are substantially outweighed for the purpose here at issue, by Honduras' interests.

5. While the suit by Empresa was pending in the district court, Sociedad, the Honduran union which presently represents the seamen on Empresa's vessels, filed a complaint against the members of the Board in the District Court for the District of Columbia seeking to enjoin the same election (R. 107, pp. 1–7). It asserted, among other things, that the "Board had no jurisdiction to direct an election among the members of the plaintiff organization" (R. No. 107, p. 4) and that the plaintiff's "members will be caused to violate Honduran law by participating in the election pursuant to the Board's order" (R. No. 107, p. 6). On December 16, 1961, the district court issued a temporary restraining order (R. No. 107, p. 47), and on January 22, 1962, after a hearing granted a preliminary injunction and denied the Board's motion to dismiss the complaint (R. No. 107, pp. 68–69). The court held that the National Labor Relations Act did not confer jurisdiction on the NLRB to conduct elections among foreign seamen manning vessels flying foreign flags, and hired under foreign contracts pursuant to foreign law (R. No. 107, pp. 51–67). The Board appealed from that decision to the Court of Appeals, and this Court granted a petition for certiorari before judgment in that court (R. No. 107, p. 82).

B. *The Incres Case—No. 33.*

This case involves a State court suit to enjoin picketing of foreign flag vessels in violation of State law.

1. The petitioner, Incres Steamship Company, Ltd. ("Incres"), owns two Liberian-registered cruise ships, the *Nassau* and the *Victoria*, which for seven months of the year ply between New York City and the Caribbean (R. No. 33, pp. 285–286). During February, 1960, the respondent, International Maritime Workers Union ("IMWU"), instituted a campaign to organize the seamen on the two vessels, and by the middle of April, 1960, the IMWU had pledge cards from a majority of the seamen (R. No. 33, pp. 201–206). After unsuccessful negotiations between Incres and the union, the latter began to picket the vessels on May 13, 1960 (R. No. 33, p. 286). On that date, the *Nassau* was picketed at her pier in New York, and about 100 members of her crew left the ship, causing the cancellation of the vessel's departure (R. No. 33, p. 286). On May 15, 1960, the *Victoria* arrived in New York but was unable to dock because the *Nassau* occupied her berth (R. No. 33, p. 286). As the *Victoria* lay at anchor, she was picketed by IMWU representatives in a launch (R. No. 33, p. 286). As found by the court below, the picketing and striking resulted in several of Incres' cruises being cancelled (R. No. 33, p. 286).

Immediately after the picketing of the *Nassau*, Incres instituted the present action in the Supreme Court of the State of New York, against the IMWU and certain of its officers. Incres alleged that the

activities of the IMWU constituted an unlawful interference with its business; that the IMWU could not be certified as collective bargaining agent by the NLRB or the New York State Labor Relations Board because neither the federal nor State statute applies to foreign ships with foreign crews; that the actions of the union unlawfully interfered with the internal management of foreign vessels; and that such activities were in violation of the Treaty of Friendship, Commerce and Navigation between the United States and Liberia (R. No. 33, pp. 5–12). Ineres sought both an injunction and damages.

2. At the hearing in the New York Supreme Court, the following facts concerning the two vessels were adduced: Both the *Nassau* and the *Victoria* fly the flags of the Republic of Liberia and have been issued permanent certificates of registry by that country (R. No. 33, pp. 38–40, 234–241). Their officers are licensed by Liberia, the ships are inspected by Liberian agents, and they are subject to Liberian trade restrictions (R. No. 33, pp. 41–50).* The vessels are owned by Ineres, a Liberian corporation (R. No. 33, pp. 39–41), all of whose stock is owned by Italian nationals (R. No. 33, p. 51). All of the personnel aboard the vessels are foreign, principally Italian, and the members of the crew were signed on in Italy under Liberian articles (R. No. 33, pp. 13, 56, 60, 118, 245). The day-to-day management of the ships is conducted jointly by the President of Ineres, an Italian national who lives part-time in New York

*The only such restrictions concern trade with communist countries (R. No. 33, p. 42).

City; by a New York steamship agency, which is a wholly-owned subsidiary of Ineres; and by a steamship agency in Nassau (R. No. 33, pp. 52–62). While the regular cruises of the vessels are between New York and the Caribbean, the ships return to Italy every year, where they are repaired and refitted, and the crews receive vacations (R. No. 33, pp. 64, 67). Genoa, Italy, is the actual home port of the vessels (R. 269; see Petitioner's Brief, No. 33, p. 5, n.2).

3. The New York Supreme Court, pointing out that the vessels "were completely foreign owned, dominated and controlled; that the seamen on those ships were foreign nationals; that the officers of the Ineres Steamship Company, Ltd. were foreign nationals," held that it had jurisdiction to enjoin the picketing and that the picketing was unlawful, and granted a permanent injunction (R. No. 33, pp. 70–72, 250–256). The Appellate Division affirmed (R. No. 33, pp. 265–274). The Court of Appeals of New York, however, reversed, and ordered that Ineres' complaint be dismissed.

The majority of the New York Court of Appeals held (R. No. 33, p. 291) that, under the contacts theory upon which the Board had decided other flag-of-convenience cases (see *supra*, pp. 16; 6, n. 2), "[i]t is surely arguable that the board would exercise jurisdiction in the dispute as to which this injunction was ordered"; and that, under this Court's decision in *San Diego Unions* v. *Garmon*, 359 U.S. 236, the Board has exclusive primary jurisdiction over the dispute. Judge Fuld, dissenting (with whom Judge Burke and

except in one respect, Judge Voorhis, concurred), was of the view that the Act "clearly" does not apply "to a controversy affecting a foreign (Liberian) flagship—engaged in foreign commerce bringing it to and from United States ports for short stays—which is 100% owned and controlled by foreign nationals and manned by a foreign crew, recruited and hired in the ship's home port in Italy and serving under foreign articles entered abroad" (R. No. 33, p. 292).

SUMMARY OF ARGUMENT

The National Labor Relations Act gives the Board jurisdiction over questions of representation and unfair labor practices, and Section 2(6) defines commerce to include "trade, traffic, commerce, transportation, or communication * * * between any foreign country and any State, Territory, or the District of Columbia * * *." The question is whether Congress, by this generalized definition, intended the Act to apply to the foreign flag ships involved in these cases. While a literal reading of the Act might seem to cover these cases, no one contends that the Act should be given its broadest possible scope to cover all ships operating between the United States and any foreign country. The Act must be construed in accordance with settled principles governing the interpretation of legislation touching on foreign affairs.

The United States submits that, under these principles, the Act is not applicable to foreign flag ships operating in the foreign commerce of the United States, where (1) the vessel is used to carry the trade of the flag country and the latter has other substan-

tial contacts with it, or (2) although the vessel is not used in the trade of the flag country and the latter has no other significant contacts with it. the beneficial ownership and control of the vessel, as well as other of its significant contacts, are foreign rather than American. The United States takes no position on, and urges that the Court need not and should not decide in these cases, whether the Act is applicable to foreign flag vessels where the substantial beneficial ownership is American, the vessels are operated as part of an enterprise centered in the United States and the vessels are not substantially used to meet the shipping needs of the country whose flag they fly.

A. This Court has recognized, in cases involving the question whether the National Labor Relations Act preempts the field of labor relations to the exclusion of state regulation, that, because of the essentially integral character of such relations, only a single jurisdiction can effectively regulate the problems of union organization and collective bargaining in a single bargaining unit. The problems and potential clashes arising from dual regulation are even more serious where the two sovereignties involved are foreign nations, and the subject matter of the regulation is collective bargaining on a ship which plies between the countries. In a realistic sense, therefore, a decision sustaining the jurisdiction of an agency of the United States to regulate labor relations on these ships necessarily denies the jurisdiction of other nations.

B. 1. In *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, this Court, in holding that the Labor

Act is not applicable to a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port, stated that "Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws" (p. 143); that the legislative history indicates that the Act covers "only the working men of our own country and its possessions" (p. 144); and that, in the absence of "the affirmative intention of the Congress clearly expressed," the Court would not "run interference in such a delicate field of international relations * * * where the possibilities of international discord are so evident and retaliative action so certain" (p. 147). While the *Benz* case is distinguishable because the vessel was only temporarily in an American port, its reasoning is equally applicable to the present cases, and compels the conclusion that the Act similarly does not cover the foreign flag ships here involved.

2. It is a well established principle of international law that the law of the flag State ordinarily governs the internal affairs of a ship, including the rights and duties of the crew toward the vessel and the relations between the officers and crew. In the absence of any strong basis which could call for the application of American law to labor relations on board these foreign flag ships—and there is none in these cases—the Act should be construed so as to reflect this settled principle giving "cardinal importance to the law of the flag" (*Lauritzen* v. *Larsen*, 345 U.S. 571, 584).

3. The application of the National Labor Relations Act to the foreign flag ships involved in these cases would have serious adverse consequences upon the international relations of the United States. There have been a number of diplomatic protests to the State Department over the Board's assertion of jurisdiction over flag-of-convenience shipping, and several nations have filed *amicus curiae* briefs in this Court in these cases urging that application of the Act to such ships would violate international law, would conflict with treaty provisions, and would have unsettling effects upon international relations. While the United States does not necessarily accept all of these contentions, it is plain that application of the Act to such vessels would have significant repercussions, and could lead to reprisals against American shipping by the flag countries involved. To give the Act an interpretation which would have such serious effects upon international relations "does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign nations" (*Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 384).

C. The interests of the United States in labor relations on board the Empresa and Incres vessels are insufficient, as compared with those of other nations, to bring them under the National Labor Relations Act.

1. Although the ships in the *Empresa* case are engaged in the foreign commerce of the United States, they are also substantially, if not equally, engaged in the foreign commerce of Honduras, whose flag they fly, and they have many other substantial connections with that country. In view of the real and substantial interests which Honduras has in regulating labor relations aboard these vessels, and the inevitable conflicts and clashes that would result if the United States also attempted to regulate such relations through application of the National Labor Relations Act, Congress cannot be deemed to have intended the Act to apply to these ships.

2. While the two ships in the *Incres* case are neither engaged in the commerce of, nor do they have any substantial operational contact with, Liberia (the flag country), the interests of the United States in labor-management relations on board the ships are much too insubstantial to justify the inference that Congress intended American labor policy to apply. The ultimate beneficial ownership of the ships is not American, but Italian, and virtually all of the ship's significant connections are foreign. The only contact the United States has with this maritime operation is that these Italian owned, controlled, staffed and operated Liberian flag vessels operate Caribbean passenger cruises out of a port of New York and partly under the direction of an Italian resident of New York. Weighed against the international implication of applying the Act to these ships, the minor extent to which their operations affect American

interests does not justify the inference that Congress intended, by the generalized language of the Act, to cover them. Since the Act does not apply, there was no occasion for the New York State Court of Appeals to step aside to permit the National Labor Relations Board to consider the applicability of the Act.

ARGUMENT

THE NATIONAL LABOR RELATIONS ACT IS NOT APPLICABLE TO FOREIGN FLAG VESSELS (1) WHICH ARE BEING USED TO MEET THE SHIPPING NEEDS OF THE FLAG COUNTRY AND WHICH HAVE OTHER BONA FIDE CONNECTIONS WITH THAT COUNTRY, OR (2) IN WHICH THE BENEFICIAL OWNERSHIP AND CREW ARE FOREIGN AND WHICH HAVE OTHER SUBSTANTIAL CONTACTS WITH THE COUNTRY OF WHICH HER BENEFICIAL OWNERS ARE NATIONALS

At the outset, we point out that there is no question that Congress has the constitutional power to apply the National Labor Relations Act to foreign flag ships, at least as long as they are within the territorial waters of the United States. *The Exchange*, 7 Cranch 116, 143; *Wildenhus's Case*, 120 U.S. 1, 11; *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 142. The question before the Court, therefore, is one of statutory interpretation—whether Congress intended the Act to apply to the ships involved in these cases.

Read literally, the Act might seem to apply. It gives the National Labor Relations Board jurisdiction over questions of representation and unfair labor practices affecting commerce (Sections 9(c)(1) and 10(a), 29 U.S.C. 159(c)(1) and 160(a)), and Section 2(6), 29 U.S.C. 152(6), defines commerce to include

"trade, traffic, commerce, transportation, or communication * * * between any foreign country and any State, Territory, or the District of Columbia * * *."

No one suggests, however, that this language should be given its broadest possible sweep, *i.e.*, that the Act covers *all* ships that operate between the United States and any foreign country. Indeed, the Board itself specifically disavows that the Act would apply to a labor dispute aboard the *Queen Mary* (see Brief for the Regional Director and Members of the National Labor Relations Board in Nos. 91, 93 and 107, hereinafter cited as "Bd. Br.," p. 35, n. 38), even though the operations of that vessel between the United States and Great Britain would be covered by a literal reading of the Act. For, as Judge Friendly explained in the *Empresa* case (R. Nos. 91 and 93, p. 72), "[w]ords are not thus stretched to their literal bounds because statutes relating to international matters are construed in accordance with international usage * * *."

The realities of ocean transportation are that ships which ply between two countries are engaged in the commerce of both countries, and that each country has a legitimate concern in regulating and controlling that commerce insofar as its own interests are involved. As Judge Friendly pointed out, with respect to the Empresa ships (*id.*, p. 77), "[t]hough the vessels are engaged in the foreign commerce of the United States, they are also engaged in the foreign commerce of Honduras." The question is thus the extent to which Congress intended to make American labor policy applicable to American foreign commerce

in which both the United States and a foreign country have legitimate, although sometimes conflicting, interests.

The problem must be considered in the light of the practical consideration, set forth below, that only one nation can effectively regulate the problems of union organization and collective bargaining in a single bargaining unit. Accordingly, a decision sustaining the jurisdiction of an agency of the United States necessarily denies the jurisdiction of other nations. The question is, which nation is to have effective power to regulate labor-management relations on board a vessel engaged in international trade.

The basic error in the approach which the Board has taken in determining the applicability of the Labor Act to particular foreign flag ships lies in its failure to recognize, and give proper weight to, the conflicting and competing interests of the foreign nations involved. Because there is no single international regulatory authority which can adjust and accommodate these competing national interests, it is appropriate and necessary for American courts and agencies to construe American legislation whose effect might reach beyond our boundaries so as to minimize actual and potential conflicts with the regulatory policies and programs of foreign nations.

As we develop below, under settled principles governing the construction of legislation touching foreign affairs, the National Labor Relations Act is not applicable to foreign flag carriers operating in the foreign commerce of the United States, where—

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(1) the vessel is used to carry the trade of the flag country and the latter has other substantial contacts with it, or

(2) although the vessel is not used in the trade of the flag country and the latter has no other significant contacts with it, the beneficial ownership and control of the vessel, as well as other of its significant contacts, are foreign rather than American.

The United States takes no position on, and urges that the Court need not and should not decide in these cases, whether the Act is applicable to foreign flag vessels where the substantial beneficial ownership is American, the vessel are operated as part of an enterprise centered in the United States and the vessels are not substantially used to meet the shipping needs of the country whose flag they fly.

A. ONLY ONE NATION CAN EFFECTIVELY REGULATE THE PROBLEMS OF UNION ORGANIZATION AND COLLECTIVE BARGAINING WITH RESPECT TO A SINGLE VESSEL OPERATING IN INTERNATIONAL TRADE

This Court has recognized, in cases involving the question whether the National Labor Relations Act preempts the field of labor relations to the exclusion of State regulation, that, because of the essentially integral character of such relations, only one jurisdiction can effectively regulate the problems of union organization and collective bargaining in a single bargaining unit. In *Bethlehem Co.* v. *State Board,* 330 U.S. 767, 776, the Court pointed out: "If the two boards [Federal and State] attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily

denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict." And in *La Crosse Tel. Corp.* v. *Wis. Board*, 336 U.S. 18, 25, it noted that dual regulation was "fraught with potential conflict." See also, *Hill* v. *Florida*, 325 U.S. 538; *Automobile Workers* v. *O'Brien*, 339 U.S. 454; *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383; *Garner* v. *Teamsters Union*, 346 U.S. 485; *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468; *Mine Workers* v. *Arkansas Flooring Co.*, 351 U.S. 62.

The problems and potential clashes arising from dual regulation of labor relations are even more serious where the two sovereignties involved are foreign nations, and the subject matter of the regulation is collective bargaining on a ship which plies between the countries. For in such a situation, each country may have a strong interest in regulating labor relations aboard a vessel which is engaged in its own foreign commerce; the two countries, however, may follow widely varying, or even diametrically opposed, labor-management relations policies. Inevitably then, an attempt by both nations to apply their own labor laws to the same ship is likely to lead not only to a clash of sovereignties, but also to the unsettling of the labor relationships which labor policy attempts to stabilize.

The serious problems posed by dual national regulation of labor relations on a ship operating in the foreign trade of both nations is dramatically illustrated in the *Empresa* case. The Republic of Hon-

duras has a labor code which apparently governs labor relations aboard ships of Honduran registry (R. No. 107, pp. 28–30, 43–44). Since 1941, the seamen on Empresa's ships have been represented by a Honduran Union, Sociedad Nacional de Marineros de Honduras ("Sociedad"), which is recognized by the Republic of Honduras as their collective bargaining agent (R. Nos. 91 and 93, pp. 4, 60). This union has entered into a detailed collective bargaining agreement with Empresa, effective through February 15, 1963, which covers such subjects as hiring, wages, hours, vacations and holidays, overtime pay, grievance procedures and arbitration, medical treatment, and strikes (id., pp. 22–35, 60).

Both Honduran law and the collective bargaining agreement require Empresa to recognize Sociedad as the exclusive bargaining agent of its unlicensed seamen (*id.*, pp. 23, 60). Sociedad, however, declined to appear on the ballot in the election which the Board has directed to be held on Empresa's vessels (*id.*, pp. 18–19). On the other hand, the National Maritime Union of America, AFL–CIO ("NMU"), which is one of the unions on the ballot in that election, cannot represent Empresa's seamen under Honduran law, since the Honduran Labor Code forbids a union from representing Honduran seamen aboard Honduran-registered ships if "it does not have recognition of its juridic personalty" (which the NMU apparently does not have in Honduras), or if at least 90 per cent of its members are not Honduran (*id.*, pp. 5, 61). Thus, if the NMU were selected by the Honduran seamen aboard Empresa's vessels as their rep-

resentatives, any bargaining between Empresa and that union would run afoul of the provisions of Honduran law making Sociedad the exclusive bargaining agent of these same seamen.

Empresa would thus be placed in the dilemma that, if the NMU were selected as the employees' representative and it bargained with the NMU as required by the National Labor Relations Act, it would violate Honduran law and its obligations under its collective bargaining agreement with Sociedad; conversely, if it refused to bargain because of its obligations under Honduran law, it would presumably be in violation of the National Labor Relations Act.[1] In addition, it

[1] The conflicting obligations which Empresa might have under American and Honduran law if the Labor Act were applied to its ships presents problems similar to those which have arisen when an antitrust judgment has attempted to compel a defendant in an American court to take steps abroad which conflict with the laws of a foreign country. In such a situation the foreign court may decline to give effect to the American judgment. Compare *United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504, 105 F. Supp. 215 (S.D. N.Y.), where the district court directed the reconveyance of certain patents which DuPont had conveyed to Imperial Chemical Industries, a British Company, with *British Nylon Spinners Ltd.* v. *Imperial Chemical Industries*, L. R. [1953] 1 Ch. 19, L. R. [1955] 1 Ch. 37, where the British court enjoined the British Company from reconveying the patents as directed by the American judgment. In such circumstances, the decree of the American antitrust court may recognize, either explicitly or by interpretation, that it does not require the defendant to do anything which would violate the law of a foreign country. See *United States* v. *General Electric Co.*, 82 F. Supp. 753, 115 F. Supp. 835, 878 (D. N.J.); *Holophane Company* v. *United States*, 352 U.S. 903, affirming (except as to one paragraph of the judgment, which was affirmed by an equally divided court) 119 F. Supp. 114 (S.D. Ohio).

seems probable that when the Empresa vessels were in Honduran waters, the Honduran courts and authorities would decline to give effect to any contract between Empresa and the NMU and, conversely, would require Empresa to observe its present agreement with Sociedad. Thus, different rules might govern the internal operations of the ship, depending upon whether she happened to be in an American or a Honduran port; and there would be continuing uncertainty and conflict over which rules apply when the ship was on the high seas or in ports of other nations. This Court's language in *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 384, in refusing to apply the law of the place of injury to a maritime tort involving a foreign sailor on a foreign ship, is, with the substitution of the words "labor relations" for the word "compensation," fully applicable to the present cases:

> To impose on ships the duty of shifting from one standard of [labor relations] to another as the vessel passes the boundaries of territorial waters would be not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country. * * *

The potential conflicts and problems that would arise if the United States and Honduras both attempted to regulate labor relations aboard the Honduran ships involved in the *Empresa* case illustrate the need for construing the Labor Act so as to avoid such difficulties. The only alternative, under the NLRB view, is equally drastic: it is to say that

Congress denied Honduras the right to govern labor-management relations between an Honduran corporation as employer and Honduran crew upon an Honduran vessel substantially engaged in the foreign commerce of Honduras.

An intent to assert such an aggressive position should not lightly be attributed to Congress. As we now show, when the Act is viewed in the light of its purposes, history and policy and the settled rules which have been developed for construing legislation having an impact upon international relations, it must be read as not applying to foreign flag vessels which either operate substantially in the commerce of, and have other substantial contacts with, the foreign flag country, or of which the beneficial ownership and crew, and other significant contacts, are foreign.

B. CONGRESS DID NOT INTEND THE NATIONAL LABOR RELATIONS ACT TO APPLY TO FOREIGN FLAG SHIPS WHICH CONSTITUTE AN INTEGRAL PART OF THE FOREIGN COMMERCE OF, AND HAVE OTHER BONA FIDE CONTACTS WITH, THE FLAG COUNTRY, OR IN WHICH THE BENEFICIAL OWNERSHIP AND CREW AND OTHER SIGNIFICANT CONTACTS ARE FOREIGN

1. *The Act should be construed to recognize the need for comity and reciprocity in relation to international maritime commerce, and for avoiding conflict with international usage.*

In *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, this Court held that the Labor Act is not applicable to "a foreign ship operated entirely by foreign seamen under foreign articles while the vessel is temporarily in an American port" (p. 139). While

the case is, of course, distinguishable in that the vessel was only temporarily in an American port, and did not operate regularly in the foreign commerce of the United States, the considerations relied upon by the Court are, we believe, equally applicable in the present cases, and require the conclusion that the Act is not applicable to the *Empresa* and *Incres* vessels.

The Court stated in *Benz* that "[o]ur study of the Act leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws" (p. 143). It pointed out (pp. 143–144) that the "whole background of the Act is concerned with industrial strife between American employers and employees"; that the report of the House Committee had stated that the bill "has been formulated as a bill of rights both for *American* workingmen and for their employers" and was designed to correct inadequacies in legislation which had deprived "the *American* workingman * * * of his dignity as an individual" (emphasis by the Court); and that this statement "inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." The Court noted (pp. 144–146) that, in the Seamen's Act of 1915, Congress had prohibited the payment of seamen's wages in advance and specifically made the prohibition applicable to foreign vessels "while in waters of the United States"; and that the Court had refused to read into that Act, in the absence of a specific Congressional intention, a "sweeping provision" making the Act applicable to prohibit

advances of seamen's wages "made by foreign vessels in foreign ports." The Court stated (p. 146) that similarly "such a 'sweeping provision' as to foreign applicability was not specified in the [National Labor Relations] Act," and it concluded (pp. 146–147):

> * * * We cannot read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. *For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.* We, therefore, conclude that any such appeal should be directed to the Congress rather than to the courts. [Emphasis added.]

The rule invoked in *Benz* is a well-established principle governing the interpretation of statutes which might be extended to foreign vessels. Earlier, in *Lauritzen* v. *Larsen*, 345 U.S. 571, 582, the Court said—

> International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. * * * in dealing with international com-

> merce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Here, as in *Benz, supra,* "the possibilities of international discord are so evident and retaliative action so certain" if the Labor Act is held applicable to the foreign flag ships involved in these cases, that a strong showing of an intention to assert jurisdiction would be required to support the NLRB ruling. Here, as in *Benz,* 353 U.S. 138, the "parties point to nothing in the Act itself or its legislative history that indicates in any way that the Congress intended to bring such disputes within the coverage of the Act" (p. 142). The argument for jurisdiction, as in *Benz,* is an effort to apply the Act "to resolve labor disputes between nationals of other countries operating ships under foreign laws" (p. 143).[8] In the absence of "the affirmative intention of Congress clearly expressed" (p. 147) that the Act apply to labor disputes aboard such ships, the rationale of *Benz* requires the conclusion that here, too, Congress did not intend the Board "to run interference in such a delicate field of international relations" (*ibid.*).[8]

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[8] The Board points out (Bd. Br., 43) that in 1959 Congress enacted Section 14(c)(1) of the Act, which provides that "the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959"; and it states that, under

2. *Comity and reciprocity in relation to international maritime commerce require honoring, in the absence of any strong basis for asserting jurisdiction, the traditional maritime principle that the law of the flag nation governs the internal affairs of a vessel.*

It has long been recognized that comity, reciprocity and stability in international maritime relations are promoted by observing Chief Justice Marshall's wise admonition that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains * * *." *The Charming Betsy*, 2 Cranch 64, 118. See also *The Nereide*, 9 Cranch 388, 423; *MacLeod* v. *United States*, 229 U.S. 416, 434; *Sandberg* v. *McDonald*, 248 U.S. 185, 195; *Lauritzen* v. *Larsen*, *supra*, 578.

The two relevant principles of international law are well-established. *First*, the nationality of a ship is

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those standards, the Board would have asserted jurisdiction over these disputes, and had, in fact, already taken jurisdiction in one flag-of-convenience case. The same contention is made by the petitioner in No. 93 (Br. 35–37, 54), and by the Seafarer's International Union in its brief *amicus curiae* in No. 33, pp. 14–16.

The short answer is that the "standards prevailing upon August 1, 1959" to which Section 14(c)(1) refers were the minimum dollar amounts of commerce which the Board had announced it would require before taking jurisdiction. See *Twenty-Third Annual Report*, National Labor Relations Board (G.P.O., 1959), p. 8; *Siemons Mailing Service*, 122 N.L.R.B. 81, 85; II *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959* (G.P.O., 1959) 1153–1154, 1720; 105 Cong. Rec. 6548–6549, 18134. There is nothing in either the language or the legislative history of the 1959 Act which gives even faint support to the Board's suggestion that Section 14(c)(1) establishes the applicability of the Labor Act to the foreign flag ships involved in these cases.

determined by its registration and flag. *Lauritzen* v. *Larsen*, 345 U.S. 571, 584. See also, *e.g.*, *The Merritt* 17 Wall. 582, 585–586; *In Re Ross*, 140 U.S. 453, 472–473; *St. Clair* v. *United States*, 154 U.S. 134, 151–152; *Cunard S. S. Co.* v. *Mellon*, 262 U.S. 100, 123; *United States* v. *Flores*, 289 U.S. 137, 155–157. *Second*, the law of the flag state ordinarily governs the internal affairs of a ship, including the rights and duties of the crew toward the vessel and the relations between the officers and crew. Thus, in *Wildenhus's Case*, 120 U.S. 1, 12, the Court, after pointing out that a nation has the power to subject foreign ships to its domestic law when they enter a domestic port, continued:

> From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. * * *

In *The Belgenland*, 114 U.S. 355, 367, the Court stated that questions relating to seamen's wages are normally governed by the law of the flag country.

The foregoing principles of international law are reflected not only in the settled decisions of this Court,* but also in the Treaties of the United States and the regulations of the State Department. The United States has Treaties of Friendship with many foreign nations, including Honduras and Liberia, dealing with the vessels of the respective countries. For example, Article X of the Treaty of Friendship, Commerce, and Consular Rights between Honduras and the United States, 45 Stat. 2618, provides that merchant vessels flying the flags and having the papers of either country "* * * shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown." Article XXII of the same treaty provides:

> A consular officer shall have exclusive jurisdiction over controversies arising out of the internal order of private vessels of his country, and shall alone exercise jurisdiction in cases, wherever arising, between officers and crews, pertaining to the enforcement of discipline on board, provided the vessel and the persons charged with wrongdoing shall have entered a port within his consular district. Such an officer shall also have jurisdiction over issues concerning the adjustment of wages and the execution of contracts relating thereto provided the local laws so permit.

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* The principle that the flag and registry of a vessel determine the law applicable to internal matters has sometimes been viewed as based on the theory that a ship is part of the territory of the nation whose flag she flies. *Patterson* v. *Bark Eudora*, 190 U.S. 169, 176; *United States* v. *Flores*, 289 U.S.

Similar provisions are contained in Article XV of the Treaty of Friendship, Commerce, and Navigation (54 Stat. 1739), and Article X of the Convention Respecting Consular Officers, between Liberia and the United States (54 Stat. 1751).

The regulations of the State Department similarly provide that a foreign vessel includes "* * * any vessel regardless of ownership, which is documented under the laws of a foreign country," 22 C.F.R. 81.1(f); and that persons employed on foreign vessels are "* * * subject to the jurisdiction of the country under whose registry the vessel operates * * *." 22 C.F.R. 81.12.

When Congress enacted the National Labor Relations Act, it presumably defined the reach of the Act, in its application to foreign flag vessels, in the light of these settled doctrines of international law. "Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions * * * it would be applied by the courts to foreign events, foreign ships and

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137, 155. On the other hand, this theory of territorial extension has been described as "a figure of speech, a metaphor." *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 123. But whatever the theory upon which the rule rests, the rule itself is both firmly established and of practical necessity. As this Court pointed out in *Lauritzen* v. *Larsen*, *supra*, 345 U.S. at 585:

> Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag-state, but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.

foreign seamen only in accordance with the usual doctrine and practices of maritime law" (*Lauritzen v. Larsen*, 345 U.S. 571, 581).

This is not to say that Congress necessarily intended the Act never to be applicable to foreign flag vessels. For the principle is only that maritime law "gives cardinal importance to the law of the flag," and that "the weight given to the ensign overbears most other connecting events in determining applicable law" (*Lauritzen v. Larsen*, 345 U.S. 571, 584, 585). There may be situations in which other considerations may outweigh the law of the flag, and may call for the application of the Labor Act to foreign flag vessels.

We lay aside, therefore, the question of how much deference is due the labor laws of the flag nation where a foreign flag vessel is not used to meet the shipping needs of the country of its registry, and has no significant connections with that country other than the fact of registry. One would have to consider not only the weight of this country's interests but also the possible significance, if any, of the fact that the doctrine that the law of the flag should control was established long prior to the growth of true "flag of convenience" shipping, lacking any significant link with the flag nation and having close links to the United States.[10] It is also relevant to note in this connection that Article 5 of the 1958 Geneva Convention on the High Seas (2 U.N. Conf. on the Law of the Sea, Geneva (1958) 136), which has been ratified by the

[10] See, Harolds, *Foreign Flag Operations*, 28 Fordham L. Rev. 295; Note, *Panlibhon Registration*, 60 Col. L. Rev. 711; Note, *The Flag-of-Convenience Fleet*, 69 Yale L. Jour. 498.

United States but is not yet effective because the requisite number of countries have not yet ratified, provides:

> 1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. *There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.*
>
> 2. Each State shall issue to ships which it has granted the right to fly its flag documents to that effect. [Emphasis supplied.]

Thus, the Convention suggests the possibility that the "law of the flag" principle may be qualified by the requirement that there be a "genuine link" between the flag State and the vessel, although we should also point out that the Senate Report on the Law of the Sea Conventions, Executive Rept. No. 5, 86th Cong., 2d Sess., p. 5, reflects the view that the "genuine link" principle does not mean that one State may determine unilaterally that there is no genuine link between a ship and the country of its registry. See also, Note, *Effect of the "Genuine Link" Principle of the 1958 Geneva Convention on the National Character of a Ship*, 35 N.Y.U. Law Rev. 1049; Jessup, *The United Nations Conference on the Law of the Sea*, 59 Col. L. Rev. 234, 255–257; Boczek, *Flags of Convenience* (Harvard University Press, 1962), pp. 209–286, 290–292.

There is no room for doubt or qualification in the cases before the Court. In the *Empresa* cases, the vessels play an integral part in the trade of, and also have significant contacts with, the flag country. In the *Incres* case the beneficial owners, crew and significant contacts are all foreign rather than American. Plainly, there is not present any "heavy counterweight" to the fact of foreign registry (*Lauritzen* v. *Larsen*, 345 U.S. 571, 586) which could possibly call for the application of American labor law to labor relations on board these foreign flag ships. The case for respecting the law of the flag is much stronger in dealing with labor relations than in dealing with torts, the payment of wages and similar incidents which might be governed by various sets of laws on different occasions without great inconvenience to the parties concerned. Collective bargaining, however, is an on-going relationship which must be governed, regardless of the temporary location of the vessel, by a single set of rules. See, *supra*, pp. 32–37.

3. *The assertion of NLRB jurisdiction over these vessels, in disregard of the established principle of international law, would disturb international relations with friendly maritime nations.*

The dangers to which we have adverted are neither abstract nor theoretical. The position of the Board has already evoked protests and mention of reprisal among maritime nations.

Shortly after the Board announced its decision taking jurisdiction in the *Empresa* case the Ambassador of Honduras filed a formal diplomatic protest with

the Secretary of State stating that his government felt great concern—

> because the Board has paid no consideration to the fact that all those vessels fly the Honduran flag and are registered in the Honduras registry, and has also ignored the Treaty of Friendship, Commerce and Consular Rights between Honduras and United States * * *. [R. No. 107, p. 42.]

The Ambassador invoked the "well established principle of International Law" that "a vessel is subject exclusively to the law of the State of registry and whose flag * flies regardless of ownership," and argued that "a domestic statute should never be construed to violate binding and effective principles of International Law" (R. No. 107, p. 44). He further stated (*ibid.*) that under the Honduran Labor Law "Honduras has exclusive jurisdiction over the relations of employers and employees working in its territory and in its ships flying its flag," that this "jurisdiction can not be renounced," and that "the Honduras Government can never accept that a foreign Union * * * represent the seamen of Honduras that work on vessels of Honduran flag. According to our Labor Laws those seamen are represented by a Honduras Union properly established in that country and regulated by the National Labor Laws."

The Republic of Liberia has taken a similar position in a brief *amicus curiae* in this Court challenging NLRB jurisdiction over the vessels involved in the *Incres* case. On several occasions Liberia has made it clear that it would regard an assertion of NLRB

jurisdiction over vessels flying the Liberian flag as a serious violation of the principles of international law (Brief of the Republic of Liberia in No. 33, p. 5). The Republic of Panama considers any attempt by the United States to apply its labor laws to Panamanian flag vessels as "constituting a direct offense to the sovereign rights of Panama to govern all such matters concerning the internal affairs of its vessels" (Brief of the Republic of Panama as *Amicus Curiae* in No. 33, p. 7). Panamanian representatives have also spoken of the likelihood of reprisals against the United States in the event it persists in the alleged "offense" (*id.*, p. 19)

The government of the United Kingdom of Great Britain and Northern Ireland has also protested the action of the NLRB, contending that the assertion of jurisdiction over foreign-flag vessels threatens a profound disturbance of maritime law with resulting unsettlement of a significant aspect of international relations. See the Briefs of the Government of the United Kingdom of Great Britain and Northern Ireland as *amicus curiae*, in No. 33 and in Nos. 91 and 93.

Although the United States does not necessarily accept all the contentions of the foreign nations concerning foreign flag vessels, it should be stressed that the views expressed by them in this Court are not merely the arguments of counsel, but have been firmly conveyed to this government in diplomatic intercourse. In the opinion of the United States officials responsible for our international relations, insistence upon application of the National Labor Relations Act to these

foreign-registered ships would be considered to be an affront to foreign nations and would have disturbing consequences.

The international consequences of asserting jurisdiction over maritime labor relations involving U.S. business interests cannot be supposed to have been the sole factor in formulating a congressional policy, nor do we suggest that they are the only proper criterion in construing the Act. In the present case, however, as we now show, the domestic interests of the United States are not sufficiently affected to justify a departture from the generally-accepted international rule.

C. THE INTERESTS OF THE UNITED STATES IN LABOR RELATIONS ON BOARD THE EMPRESA AND INCRES VESSELS ARE INSUFFICIENT, AS COMPARED WITH THOSE OF OTHER NATIONS, TO BRING THEM UNDER THE NATIONAL LABOR RELATIONS ACT.

1. Although the ships in the *Empresa* case are engaged in the foreign commerce of the United States, they are also substantially if not equally engaged in the foreign commerce of Honduras (R. Nos. 91, 93, p. 77). They call regularly at Honduran ports (*id.*, p. 60); they play an important, if not a vital, role in the foreign trade of Honduras.

The vessels also have substantial other contacts with Honduras. See the Statement, *supra*, pp. 16–17. As Judge Friendly explained (*id.*, p. 77):

> The case made by plaintiff's complaint goes far beyond the flying of the Honduran flag, important as *Lauritzen* teaches that to be. In this case there are also the Honduran citizenship of the crews, the employment of the crews in Honduras under Honduran articles, the vessels' regular visits to Honduras, the Honduran

corporate identity—admittedly not fictitious—of the owner, the long recognition of and contract with a Honduran union, and the provisions of Honduran law regulating labor matters.

Since the vessels are engaged in the commerce of Honduras and have many other substantial connections with that country, Honduras, whose flag they fly, has a substantial interest in regulating labor relations aboard the ships. In these circumstances, for the reasons previously discussed, Congress cannot be deemed to have intended the National Labor Relations Act to apply to the ships.

The basic error of the Board in the *Empresa* case was its view that it need inquire only into the existence of "substantial United States contacts" which would bring the Empresa ships "within the jurisdictional coverage of the Act" (R. Nos. 91, 93, p. 16). In determining whether, and to what extent, the Act may properly be applied to labor relations aboard foreign flag vessels, the crucial threshold question is not merely the extent of the United States contacts but, more important, whether the vessels have sufficiently substantial connections with the flag country so that Congress cannot fairly be said to have intended to overturn the established doctrine of international law and displace the foreign regulatory pattern by the American standards.

In the present case the interests of Honduras in this labor-management relationship are not only real and substantial but, if the factor were material, would seem to overbalance the interests of the United

States. Thus, while the vessels are engaged in the foreign commerce of the United States, it is also the foreign commerce of Honduras; the situation is no different in this respect than a claim to jurisdiction over the seamen on board the *Queen Mary*. The owner and immediate employer is an Honduran corporation; and although a United States corporation owns all the stock, it is undeniable that the Honduran corporation has an independent existence with its own officers, employees and business. The vessels are operated as part of the United Fruit enterprise but under time charters, which are familiar maritime engagements, placing upon the Honduran owner the responsibility not only for the physical condition of the ships and for provisioning them, except for fuel, but also for hiring the officers and crews and handling all matters concerning terms and conditions of employment, including payment of wages and discipline. The crews are mostly Hondurans; they are hired in Honduras, return to Honduras and sign Honduran shipping articles. They have been represented for the purposes of collective bargaining by an Honduran union.

Under these circumstances there is no room for either administrative or judicial weighing of "contacts." Any assertion of jurisdiction to apply the National Labor Relations Act for the purpose of determining the bargaining agent under the laws of the United States would frustrate the laws of Honduras. The Act's all-encompassing definition of "commerce" is not enough to support the conclusion that Congress intended to authorize an administrative agency thus

to sweep aside the traditional right of another sovereign state whose interests in labor-management relations on board the vessels flying its flag are not nominal, but real and substantial.

The Board attempts to justify its practice of determining the applicability of the Act to foreign-flag ships on the basis of evaluating the relative significance of the American and foreign contacts, by reference to *Lauritzen* v. *Larsen*, 345 U.S. 571 (see *West India Fruit and Steamship Co.*, 130 N.L.R.B. 343, 354–356). The *Lauritzen* case was a personal injury action brought under the Jones Act by a Danish seaman for injuries sustained aboard a Danish ship while in Havana. The Court, in denying recovery, set forth "the several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim, and the weight and significance accorded them" (p. 583). See also, *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 381–384.

But the choice of law to govern a maritime tort raises altogether different questions than a claim of jurisdiction to regulate labor-management relations. Although the weighing of various "contacts" is a recognized basis for choosing the law to govern the legal incidents of a single transaction, this Court in *Romero* recognized the undesirability of applying shifting standards for determining compensation for injuries as a vessel moves from the territorial waters of one nation to another (358 U.S. at 384, *supra*, p. 36). It would be even more undesirable to apply such shifting standards for deciding whether the Na-

tional Labor Relations Act applies to foreign flag vessels, for the collective bargaining relationship has a continuing and integral character that debars constructive regulation by more than one jurisdiction (see *supra*, pp. 32–37). Thus, even if the Act applies to foreign flag ships which use foreign registration, despite being completely American in ownership and operation, to escape American labor laws, Congress cannot be supposed to have intended the application of the Act to other foreign flag ships to depend upon an *ad hoc* evaluation of the relative significance of their domestic and foreign contacts.

2. In the *Incres* case, the New York Court of Appeals, in reversing the State court injunction against picketing of the foreign flag vessels, held that, under the contact theory which the Board employs for determining the applicability of the Act to such ships, it "is surely 'arguable' that the board would exercise jurisdiction in the dispute as to which this injunction was ordered" (R. No. 33, p. 291); and accordingly that, under *San Diego Unions* v. *Garmon*, 359 U.S. 236, 245, the subject matter of the litigation was within the exclusive primary jurisdiction of the Board.

The two ships in the *Incres* case fly what we have called "true flags of convenience," *i.e.*, they are neither engaged in the commerce of, nor do they have any substantial operational contact with, Liberia, the country whose flag they fly. But the interests of the United States in labor-management relations on board these ships are much too insubstantial to justify the inference that Congress intended American labor

policy to apply. The ultimate beneficial ownership is not American but Italian.

Virtually all the significant connections of these vessels are foreign. The vessels are of Liberian registry, fly the Liberian flag, and are owned by a Liberian corporation, all of whose stockholders and officers are Italians (R. No. 33, pp. 13, 47, 50). All of the seamen are foreign citizens and residents, principally Italian; they were employed in Italy under Liberian articles (*id.*, pp. 13, 56, 60, 292). These vessels return to Italy yearly to give the crews leave and for refitting and repair (*id.*, pp. 64, 67, 266, 292). Their home port is Genoa (R. 269; see petitioner's brief, No. 33, p. 5, n. 2). The day-to-day management of the vessels is conducted by an Italian national, located in New York City, who is president of the Liberian corporation which owns the vessels, by a New York corporate steamship agency which is a wholly-owned subsidiary of the Liberian corporation, and by a tourist agency in Nassau, Bahamas (R. No. 33, pp. 51–62). The only contact the United States has with this maritime operation is that these Italian owned, controlled, staffed and operated Liberian flag vessels operate Caribbean passenger cruises out of the Port of New York and partly under the direction of an Italian resident in New York.

Weighted against the international implications of applying the Act to these ships (see *supra*, pp. 37–40, 47–50), the minor extent to which their operations affect American interests does not justify the inference that Congress intended, by the generalized language of the Act, to cover them. As Judge Fuld cogently

pointed out in his dissenting operation in the Court of Appeals (R. No. 33, pp. 292–293):

> * * * [I]f the National Labor Relations Act were to be held to cover the foreign-owned ships here involved simply because they dock in New York City and employ a New York corporation as their American agent, it would follow that the Act applies to give the board jurisdiction over controversies involving seamen on board the great fleets of foreign flag and foreign-owned passenger and cargo vessels while engaged in trips between the Port of New York and the foreign countries.
>
> It is hardly necessary to observe that in terms of comity between nations such a result could not help but have a disastrous effect. * * * We will not impute to Congress—unless the intention is clearly expressed (cf. *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285–286)—a concern to deal with the labor relations of alien seamen on foreign flag vessels, owned by foreign nationals throughout the world or even while they are in American waters. * * *

As we have shown above, it has long been a settled rule of international law that the flag should ordinarily control the internal affairs of a ship (see, *supra*, pp. 41–44). If an intent to authorize any exceptions is to be imputed to Congress—a point as to which we express no opinion—surely the authority must be confined to cases in which the foreign flag is used by United States enterprises to avoid their obligations under United States law. The *Incres* case affords no basis for such a contention.

It follows that the National Labor Relations Act does not "arguably" apply to the labor dispute involving the *Incres* ships so as to require the New York courts to disclaim jurisdiction. This is true for two reason.

First, upon the undisputed facts the Board could not, without violating the statute, conclude that it has jurisdiction. There is no room for further investigation, no occasion for drawing inferences or weighing and balancing opposing considerations, no opportunity for exercising an expert judgment of policy that might rationally lead to an assertion of NLRB jurisdiction. Labor-management relations upon a foreign flag vessel whose ownership, both corporate and beneficial, whose management, and whose employees are all foreign, is not even "arguably" covered by the National Labor Relations Act. There is no room, therefore, for the application of the doctrine stated in the second *Garmon* case (359 U.S. 236, 245) and *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173.

Second, if it were necessary to reach the point, we would agree with Judge Fuld that the doctrine of the second *Garmon* case does not apply to so unique an issue as the extraterritorial applicability of the National Labor Relations Act. Judge Fuld stated (R. No. 33, pp. 294-295):

> This is clearly not a *Garmon* * * * type of situation in which the courts must yield to the exclusive authority vested in the National Board over conduct arguably an unfair labor practice or protected activity, under the Act.

> If there is 'arguability" here, it is not as to whether there was an unfair labor practice or protected activity, but rather as to the very scope and reach of the Federal statute itself. In other words, as we have already stated, the question here is whether the Act applies at all to a strike or controversy arising out of the organization of the crew of a foreign flag vessel, owned and controlled by foreign nationals and manned by a foreign crew recruited abroad and serving under foreign articles executed abroad. * * * But courts, neither state nor federal, need step aside to permit the National Labor Relations Board to pass upon questions regarding the scope and coverage of the Act. The board has no special competence in this area, and questions concerning jurisdiction are not its exclusive concern.

The subsequent decision in *Marine Engineers Beneficial Association* v. *Interlake Steamship Co., supra,* may require some qualification of the foregoing language, but it does not limit the essential principle. In the *Interlake Steamship* case the Court held that under *Garmon* a State court has no jurisdiction to determine whether particular employee groups, which are arguably "labor organizations" and hence subject to the Act, are in fact within the statute; the rationale there was "no reason to assume that the task of interpreting and applying the statutory definition of a 'labor organization' does not call for the same adjudicatory expertise that the Board must bring to bear when it determines the applicability of §§ 7 and 8 of the Act to substantive conduct" (370

U.S. at 178). And since the application of terms such as "employer," "employee" and "labor organization" often involve the appraisal of particular facts and the application of general statutory definitions, the Board has indeed been given wide scope to apply its expertise to these problems, *e.g., National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111. But the instant case is of a different and narrowly special type. The Board has no special competence in determining the jurisdiction asserted by the United States over the ships and nationals of foreign nations, nor is there reason to suppose that Congress intended to place this delicate question affecting defense and foreign relations primarily in the hands of an administrative agency which has no special competence in the area.

Indeed, Mr. Justice Douglas' dissent in the *Benz* case (353 U.S. 147–150) rested on the ground that the labor dispute there was within the exclusive jurisdiction of the Board. The majority opinion in *Benz*, by undertaking to decide whether the Act applied, necessarily held that, if the Act does not cover a particular category of commerce, there is no occasion for the State courts to let the Board decide that issue in the first instance.

3. Under such circumstances to disregard the registry of these Honduran and Liberian vessels "does not fit the accommodations that become relevant in fair and prudent regard for the interests of foreign nations in the regulation of their own ships and their own nationals, and the effect upon our interests of our treatment of the legitimate interests of foreign na-

tions" (*Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 384). In effect, the Board would give the Act coverage, applying it in the one case to Honduran employees of an Honduran corporation on board a vessel engaged in Honduran commerce, and in the other to Italian employees of Italian interests on board a vessel engaged in foreign commerce. The application of the Act on board such ships would not, and could not, be limited to events taking place within the territorial waters of the United States. Any collective bargaining agreement entered into as a result of Labor Board proceedings would necessarily also govern labor-management relations while the vessels are on the high seas and under the jurisdiction of the flag nation, while they are in foreign ports, and even while the Honduran and Italian seamen are in their home ports in Honduras and Italy. To read the Act as covering these employment relations would violate the Court's admonition in *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 286—

> An intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.

CONCLUSION

The judgment of the New York Court of Appeals in No. 33 should be reversed. The judgment of the Court of Appeals for the Second Circuit in Nos. 91 and 93, and of the District Court in No. 107, should be affirmed.

Respectfully submitted.

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